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In the Supreme Court of the United States

OCTOBER TERM, 1980

NORTHWEST AIRLINES, INC., PETITIONER

v.

TRANSPORT WORKERS OF AMERICA, AFL-CIO, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether a right to contribution may be asserted against a labor organization by an employer held liable under the Equal Pay Act of 1963.

2. Whether a right to contribution may be asserted against a labor organization by an employer held liable under Title VII of the Civil Rights Act of 1964.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

By order of February 25, 1980, the Court invited the United States to express its views on the petition for certiorari. We urged that the petition be held or denied. The petition having been granted, we file this brief on the merits.

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The Department of Justice also has important enforcement responsibilities under Title VII, and the Department of Labor retains enforcement responsibilities under other provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to which the Equal Pay Act was added by Congress. This case presents questions concerning an employer's right to contribution from labor organizations for back pay liability arising under both Title VII and the Equal Pay Act.

STATEMENT

This suit had its genesis in *Laffey* v. *Northwest Airlines, Inc.*, 366 F. Supp. 763 (D.D.C. 1973), aff'd in part and vacated in part, 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978), in which Northwest Airlines was found to have violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d), by compensating two classes of female cabin attendants less than male cabin attendants for substantially equal work. The plaintiffs were awarded back pay under both statutes (Pet. App. 2b).

The discriminatory salary differentials found unlawful in *Laffey* were prescribed in collective bargaining agreements between Northwest and the cabin attendants' successive unions, the Transport Workers Union (TWU) and the Air Line Pilots Association (ALPA) (Pet. App. 2b). However, only Northwest was named in charges filed with the EEOC and as a defendant in the *Laffey* suit (Pet. App. 9b). The plaintiffs subsequently joined ALPA as a non-aligned party under Fed. R. Civ. P. 19 (a) without objection by Northwest, " 'solely for the limited purpose of assuring that the court [would] have before it all the parties necessary to effectuate relief' [which might, of course, necessitate reform of the collective agreement]." 567 F.2d at 477-478. ALPA did not, however, actively participate in the litigation (Pet. App. 4d).

After trial and entry of judgment against Northwest, the airline for the first time sought contribution or indemnity from the unions, moving for leave to file a third-party complaint against TWU and to amend its answer to assert a cross-claim against ALPA (Pet. App. 2b). Both motions were denied. The court of appeals affirmed that ruling as within the district court's discretion, noting (567 F.2d at 477) that "[t]o have reopened the litigation at the point [Northwest Airlines] sought it would not only have been judicially uneconomical but would also have inflicted a hardship on the parties." Northwest did not seek review of this holding in its petition for certiorari in *Laffey*.

Northwest subsequently filed this separate action seeking reimbursement from TWU and ALPA for a portion of the mandatory liability assessed against it in *Laffey* (Pet. App. 4d). The complaint alleged that the unions shared liability with the employer under the Equal Pay Act and Title VII because they had negotiated, executed, and enforced collective bargaining contracts prescribing the unlawful salary differentials (*ibid.*). Ruling on the unions' motions to dismiss, the district court held (Pet. App. B) that there is a federal common law right to con-

tribution for liability imposed under Title VII, but not under the Equal Pay Act. Regarding the Equal Pay Act. the court concluded that neither employees nor employers have a right of action against labor organizations for violations of the Act and that to imply such a right would conflict with the policies underlying the statute (*id.* at 3b-7b). As to Title VII, the court held that the failure of the *Laffey* plaintiffs to name the unions in an EEOC charge did not bar contribution for the Title VII violations because contribution arises under federal common law rather than under the statute (*id.* at 8b-10b). The court further concluded that a right to contribution from labor organizations would further the policies of Title VII (*id.* at 15b-17b). Thereafter, the district court certified its Title VII holding for interlocutory appeal under 28 U.S.C. 1292(b), and entered judgment on the Equal Pay Act contribution claim under Fed. R. Civ. P. 54(b) (Pet. App. 5d).

The court of appeals granted the interlocutory appeal, affirmed the lower court's dismissal of the contribution claim insofar as it was based on Equal Pay Act liability, and vacated and remanded for a determination of whether the Title VII contribution claim was barred by laches (Pet. App. D). The court held that a right to contribution from labor organizations would be inconsistent with the policies and scheme of the Equal Pay Act because Congress did not intend to render unions jointly liable to private plaintiffs for violations of the statute (*id.* at 10d-11d). However, the court of appeals declined to decide the question whether a right to contribution exists for liability incurred under Title VII. Instead, in view of questions raised on appeal concerning whether the Title VII contribution claim was timely, the court remanded to allow the district court to resolve that issue in the first instance (*id.* at 12d).

SUMMARY OF ARGUMENT

I

At common law, contribution among joint tortfeasors was not permitted. The great majority of states have

since abrogated that rule to some degree, usually by statute. Congress, however, has not adopted a general rule permitting joint tortfeasors to seek contribution from each other. Nor has this, or any other, federal court.

In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court applied an ancient admiralty "division of damages" rule in a suit brought by an injured longshoreman against the vessel on which his injury occurred, and permitted the vessel's owner to seek contribution from a stevedoring company notwithstanding the common law prohibition. Since then, lower courts have considered whether contribution should be permitted in conjunction with a variety of statutory torts. In so doing, the courts generally have followed much the same approach as that traditionally employed in determining whether a private right of action should be implied to remedy violations of a statute—they have ascertained Congress's purposes in passing the statute and considered whether Congress would have viewed the contended for right of action as an appropriate means of furthering those statutory purposes.

We believe that approach is sound and, accordingly, focus our attention on the impact a contribution rule would have on the policies underlying, and on the enforcement of, the Equal Pay Act and Title VII.

II

It is well-settled in jurisdictions allowing contribution that it is not available unless both the party seeking it and the party against whom it is sought potentially are liable to the injured party. Thus, it ordinarily would be appropriate to determine as a threshold matter whether respondent unions could have been sued by the cabin attendants who secured a judgment against Northwest Airlines. While the answer under Title VII is a clear yes, whether an employee can sue a union under the Equal Pay Act is an open question. There is much to suggest that Congress intended that unions would be held accountable under the Pay Act in the same manner and to the same extent as employers. On the other hand, Congress

failed to so provide expressly, and adopted an enforcement scheme—the Fair Labor Standards Act—that by its very structure and underlying rationale is inconsistent with monetary recovery from unions. Whether a right of action against unions exists under the Equal Pay Act is thus subject to doubt. The Court need not, however, decide the question since there are other compelling reasons for concluding that contribution is inappropriate under the Pay Act.

Contribution would undermine the policies, and interfere with enforcement, of the Equal Pay Act. The FLSA enforcement scheme adopted by the Pay Act is designed to prevent employers from engaging in unfair competition and to deprive them of economic benefits derived from paying substandard wages. These goals would be undermined were employers free to offset Pay Act liability through contribution. If a Pay Act judgment is paid in part out of a union's treasury, to that extent the offending employer would obtain services without paying full value for them, and its law-abiding competitors would be placed at a competitive disadvantage. Moreover, a right to contribution would nullify the Pay Act's built-in incentive for employers to abide by the statute. In addition to permitting employees to recover the difference between what they actually earned and what they should have earned, the Pay Act provides for recovery of an equivalent amount as liquidated damages. Absent this liability for double damages, an employer would risk nothing by violating the statute.

III

For somewhat different reasons, contribution would undermine the policies, and interfere with enforcement, of Title VII. As part of a recently adopted policy designed to encourage good faith efforts "of a compelling and aggressive nature" by employers or unions to eliminate discriminatory employment practices when their bargaining partners oppose voluntary compliance, the EEOC has resolved that in appropriate cases a party's good faith

unilateral bargaining efforts, even if not successful, should shield it from government prosecution under Title VII. Where the Commission in furtherance of this policy sues only one party to a bargaining agreement, a contribution claim by that party against its bargaining partner would undermine the Commission's efforts.

Contribution is also inconsistent with the preference expressed in Title VII for conciliation and voluntary resolution of disputes. In many cases, potential contribution defendants would not be parties to the underlying litigation, or would become parties at too late a stage to participate in Title VII's conciliation procedures. Moreover, where conciliation proves unsuccessful, contribution would create a number of disincentives—for plaintiffs and defendants alike—to settlement. Finally, contribution would complicate and expand Title VII proceedings, to the detriment of private plaintiffs, and would create increased burdens on the judiciary without any corresponding increase in statutory enforcement.

ARGUMENT

I. WHETHER THERE SHOULD BE A RIGHT TO CONTRIBUTION AMONG THOSE WHO HAVE CAUSED INJURY BY VIOLATING A FEDERAL STATUTORY DUTY IS BASICALLY A QUESTION OF STATUTORY INTERPRETATION

The early common law rule, enunciated in *Union Stock Yards Co.* v. *Chicago B. & Q. R.R.*, 196 U.S. 217 (1905), denied any right to contribution among joint tortfeasors. See *Halcyon Lines* v. *Haenn Ship Ceiling & Refitting Corp.*, 342 U.S. 282, 285 (1952); W. Prosser, *Handbook of the Law of Torts* § 50 at 305-306 (4th ed. 1971); *Restatement (Second) of Torts* § 886A, Comment a (1979). In recent years most states, 39 in all plus the District of Columbia, have abrogated that rule to some extent. However, only 10 did so initially by judicial fiat,[1]

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[1] *Skinner* v. *Reed-Prentice Div. Package Mach. Co.*, 70 Ill. 2d 1, 374 N.E. 2d 437 (1977) (but see Dooley, J., dissenting on the

and of those, four later adopted statutory refinements.[2] In the remaining 30 states the task of fashioning a body of contribution law was undertaken by the legislature.[3]

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grounds that the decision thrusted a "too violent wrench in the law" and that its failure to articulate how the new doctrine would operate promised a proliferation of litigation (70 Ill. 2d at 40, 374 N.E. 2d at 455)); *Royal Indem. Co.* v. *Aetna Cas. and Sur. Co.*, 193 Neb. 752, 229 N.W. 2d 183 (1975) (but see Spencer, J., dissenting on the grounds that the majority opinion ignored the rule of stare decisis and invaded the legislative arena, 193 Neb. at 767, 229 N.W. 2d at 191); *George's Radio, Inc.* v. *Capital Transit Co.*, 75 U.S. App. D.C. 187, 126 F.2d 219 (1942); *Best* v. *Yerkes*, 247 Iowa 800, 77 N.W. 2d 23 (1956); *Quatray* v. *Wicker*, 178 La. 289, 151 So. 208 (1933); *Bedell* v. *Reagan*, 159 Me. 292, 192 A.2d 24 (1963); *Underwriters at Lloyds* v. *Smith*, 166 Minn. 388, 208 N.W. 13 (1926); *Goldman* v. *Mitchell-Fletcher Co.*, 292 Pa. 354, 141 A. 231 (1928); *Davis* v. *Broad St. Garage*, 191 Tenn. 320, 232 S.W. 2d 355 (1950); *Ellis* v. *Chicago & N.W. Ry.*, 167 Wis. 392, 167 N.W. 1048 (1918).

The balance of the cases listed in the Appendix to petitioner's brief construe preexisting contribution statutes.

[2] La. Code Civ. Pro. Ann. arts. 2100-2105 (West 1977); Pa. Stat. Ann. tit. 42, §§ 8321-8328 (Purdon Supp. 1980); Tenn. Code Ann. §§ 23-3101 to 23-3106 (Supp. 1979); Wis. Stat. Ann. §§ 113.01-113.05 (West 1974).

[3] Alaska Stat. § 09.16.010 (1973); Ark. Stat. Ann. §§ 34-1001 to 34-1009 (1962); Cal. Civ. Proc. Code §§ 875-880 (West 1980); Colo. Rev. Stat. §§ 13-50.5-101 to 13.5-106 (Supp. 1979); Del. Code Ann. tit. 10, §§ 6301-6308 (1975); Fla. Stat. Ann. § 768.31 (West Supp. 1979); Ga. Code Ann. § 105-2012 (1968 & Supp. 1980); Hawaii Rev. Stat. §§ 663-11 to 663-17 (1976); Idaho Code § 6-803 (1979); Kan. Stat. Ann. § 60-2413 (1976); Ky. Rev. Stat. Ann. § 412.030 (Baldwin 1977); Md. Ann. Code art. 50, §§ 16-24 (1979); Mass. Ann. Laws ch. 231B, §§ 1-4 (Law. Co-op 1974 & Supp. 1980); Mich. Stat. Ann. § 27A.2925(1)-(4) (Supp. 1980); Miss. Code Ann. § 85-5-5 (1972); Mo. Ann. Stat. § 537.060 (Vernon Supp. 1980); Nev. Rev. Stat. §§ 17.215-17.325 (1978); N.J. Stat. Ann. §§ 2A:53A-1 to 2A:53A-5 (West 1952); N.M. Stat. Ann. § 41-3-1 (1978); N.Y. Civ. Prac. Law §§ 1401-1403 (McKinney 1976); N.C. Gen. Stat. § 1B-1 (1969); N.D. Cent. Code §§ 32-38-01 to 32-38-04 (1976); Or. Rev. Stat. § 18.440 (1977); R.I. Gen. Laws §§ 10-6-1 to 10-6-11 (1956 & Supp. 1979); S.D. Comp. Laws Ann. §§ 15-8-11 to 15-8-22 (1969 & Supp. 1979); Tex. Civ. Stat. Ann. art. 2212a, § 2

If any generalization may be drawn from this experience, it is that whether, to what extent, and how contribution should be available are widely perceived to be subjects more suited to legislative, than judicial, determination.

Congress has not adopted any general rule authorizing parties who have committed federal torts, common law or statutory, to seek contribution from joint tortfeasors. Nor has this Court announced so sweeping a rule. In *Cooper Stevedoring Co.* v. *Fritz Kopke, Inc.*, 417 U.S. 106 (1974), the Court extended an ancient admiralty "division of damages" rule—providing in essence that colliding vessels must divide damages where both are at fault—to a suit by an injured longshoreman against the vessel on which the injury occurred. The owner of the vessel impleaded and sought contribution from a company that previously had loaded onto the ship palletized crates of cargo between which the longshoreman fell while stowing cargo. Notwithstanding the common law rule against contribution, the vessel was permitted to recover from the stevedoring company half the damages due the plaintiff.

The lower courts have expressed some disagreement over whether *Cooper Stevedoring* has implications extending beyond admiralty jurisdiction, where judicial creation of substantive rules of decision has traditionally been at its zenith. The opinion in *Cooper Stevedoring* suggests not. After noting the deeply established lineage of the "division of damages" rule in admiralty, the Court explicitly referred to and relied on the longstanding difference between the common law and admiralty rules in this regard: "Even though the common law of torts rejected a right of contribution among joint tortfeasors, the principle of division of damages *in admiralty* has, over the years, been liberally extended by this Court in directions deemed just and proper." 417 U.S. at 110 (emphasis added).

(Vernon Supp. 1980); Utah Code Ann. §§ 78-27-39 to 78-27-43 (1977); Va. Code § 8.01-34 (1977); W. Va. Code § 55-7-13 (1966 & Supp. 1980); Wyo. Stat. § 1-1-110 (1977).

In any event, contrary to petitioner's assertion (Pet. Br. 14), federal courts have not "routinely permitted" contribution "in a variety of contexts." No court has recognized a right to contribution where liability arises out of the Equal Pay Act.[4] Nor has any court other than the Eighth Circuit in *Professional Beauty Supply, Inc.* v. *National Beauty Supply, Inc.*, 594 F.2d 1179 (1979), permitted antitrust violators to seek contribution from fellow violators.[5] Contribution has not been permitted among parties jointly and severally liable for violating the tax evasion provisions of the Internal Reve-

[4] See *Denicola* v. *G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977); *EEOC* v. *Ferris State College*, 23 Fair Empl. Prac. Cas. 434 (W.D. Mich. 1980); *Marshall* v. *Tombs Janitorial Services, Inc.*, 82 Lab. Cas. ¶ 33,559 (W.D. Mo. 1977); *Usery* v. *Beloit College*, 20 Fair Empl. Prac. Cas. 936, 12 Empl. Prac. Dec. ¶ 11,203 (W.D. Wis. 1976); *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057 (S.D.N.Y. 1975); *Tuma* v. *American Can Co.*, 367 F. Supp. 1178 (D.N.J. 1973). But see *Love* v. *Temple University*, 366 F. Supp. 835, 842 (E.D. Pa. 1973) (right to contribution a "close legal question"); *Wirtz* v. *Hayes Industries, Inc.*, 9 Fair Empl. Prac. Cas. 493, 494, 1 Empl. Prac. Dec. ¶ 9874 at 1090 (N.D. Ohio 1968) (common law right to contribution against union may be available).

[5] See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petition for cert. pending *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144; *In re Corrugated Container Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,690 (S.D. Tex. May 30, 1979), aff'd mem., No. 79-2439 (5th Cir. Oct. 30, 1979), cert. granted *sub nom. Westvaco Corp.* v. *Adams Extract Com.*, No. 79-972 (June 16, 1980); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979); *In re Fine Paper Antitrust Litigation*, 1979-1 Trade Cas. (CCH) ¶ 62,551 (E.D. Pa. Aug. 8, 1979); *Alabama* v. *Blue Bird Body Co.*, No. 79-23-N (M.D. Ala. June 22, 1979), appeal pending, No. 79-2667 (5th Cir. filed July 26, 1979); *Hedges Enterprises* v. *Continental Group, Inc.*, 1979-1 Trade Cas. (CCH) ¶ 62,717 (E.D. Pa. June 20, 1979); *In re Ampicillin Antitrust Litigation*, MDL 248 (N.D. Tex. Sept. 1, 1978), appealed *sub nom. Iowa Beef Processors, Inc.* v. *Spencer Foods, Inc.*, No. 78-3346 (5th Cir.); *El Camino Glass Co.* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,533 (N.D. Cal. 1976); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339 (S.D.N.Y. 1969).

nue Code.[6] And although courts have permitted contribution where liability is implied under the Securities Exchange Act of 1934, most have relied on the fact that several of the civil liability sections of that Act and the Securities Act of 1933 contain express provisions for contribution among intentional wrongdoers.[7] "This is simply a pertinent application of the general principle that the two statutes are to be administered *in pari materia.*" *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970).[8]

Title VII presents a somewhat different picture. In the instant case, the district court's conclusion that contribution may be sought rested on a series of district

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[6] *DiBenedetto* v. *United States*, 75-1 U.S.T.C. (CCH) ¶ 9503 (D.R.I. 1974); *Cohen* v. *United States*, 75-1 U.S.T.C. (CCH) ¶ 9391 (E.D. Mich. 1975).

[7] See, *e.g.*, *Heizer Corp.* v. *Ross*, 601 F.2d 330, 332 (7th Cir. 1979); *Gould* v. *American-Hawaiian S.S. Co.*, 387 F. Supp. 163, 168-169 (D. Del. 1974); *deHaas* v. *Empire Petroleum Co.*, 286 F. Supp. 809, 816 (D. Colo. 1968); *Herzfield* v. *Laventhol, Krekstein, Horwath & Horwath*, 378 F. Supp. 112, 135 (S.D.N.Y. 1974); *Globus, Inc.* v. *Law Research Service, Inc.*, 318 F. Supp. 955, 958 (S.D.N.Y. 1970).

[8] One court of appeals, in a diversity negligence action arising out of a mid-air collision, held that in that context contribution was available on a comparative negligence basis. *Kohr* v. *Allegheny Airlines, Inc.*, 504 F.2d 400 (7th Cir. 1974), cert. denied, 421 U.S. 978 (1975). In the wake of *Miree* v. *DeKalb County*, 433 U.S. 25 (1976), it is doubtful that the *Kohr* court was justified in fashioning a federal common law contribution rule rather than applying applicable state choice-of-law principles. See Note, *The Applicability of Federal Common Law To Aviation Tort Litigation*, 63 Geo. L.J. 1083 (1975). In any event, the case concerned only traditional, non-statutory tort liability; contrary to petitioner's assertion (Pet. Br. 14 n.7), Federal Aviation Act policies were not at issue.

The other decisions cited by Northwest (Pet. Br. 14-15 & n.7) recognized contribution as a matter of local, not federal, law. *Gomes* v. *Brodhurst*, 394 F.2d 465 (3d Cir. 1968) (Virgin Islands); *George's Radio, Inc.* v. *Capital Transit Co.*, 126 F.2d 219 (D.C. Cir. 1942); *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951) (Pennsylvania law applies in Federal Tort Claims Act action).

court opinions reaching or suggesting the same result.[9] However, as the Fifth Circuit observed in considering whether to permit contribution in an antitrust case (*Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, *supra*, 604 F.2d at 903), "[t]he cases decided under the Civil Rights Act [of 1964] do not even discuss the rationales for allowing contribution." More recently, a divided panel of the Third Circuit read this Court's opinion in *Cooper Stevedoring* as "provid[ing] positive support for our conclusion that a federal common law right of contribution exists" under Title VII (*Glus* v. *G. C. Murphy Co.*, Nos. 79-1507 and 79-1508 (June 27, 1980), slip op. 8), and concluded that contribution "would implement the congressional intent to hold both unions and employers liable for unlawful employment practice[s] and would aid the conciliation and settlement goals of Title VII" (*id.* at 8).[10] Thus, except in the Title VII context, it is fair to say that judicial recognition of a right to contribution has been the exception rather than the rule.

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[9] See, *e.g.*, *Bowe* v. *Colgate-Palmolive Co.*, 272 F. Supp. 332, 358 (S.D. Ind. 1967) (dismissing employer's contribution cross-claim against union because union not, on facts of case, liable for violating Title VII), aff'd in part, rev'd in part and remanded, 416 F.2d 711, 718-719 (7th Cir. 1969) (while union not blameless, no claim lies because it had not been charged before the EEOC); *Blanton* v. *Southern Bell Tel. & Tel. Co.*, 49 F.R.D. 162 (N.D. Ga. 1970) (refusing to dismiss contribution counterclaim against plaintiff union because, in view of *Bowe*, claim not utterly frivolous); *Gilbert* v. *General Electric Co.*, 59 F.R.D. 267 (E.D. Va. 1973) (refusing to dismiss contribution counterclaim against plaintiff union pending trial memoranda, relying on *Bowe* and *Blanton*); *Lynch* v. *Sperry Rand Corp.*, 62 F.R.D. 78 (S.D.N.Y. 1973) (refusing to dismiss contribution counterclaim against plaintiff union, relying on *Blanton* and *Gilbert*); *Grogg* v. *General Motors Corp.*, 72 F.R.D. 523 (S.D.N.Y. 1976) (refusing to dismiss contribution counterclaim, relying on *Lynch*, *Gilbert*, *Blanton*, and *Bowe*).

[10] While the *Glus* court focused on the proper considerations, in our view it followed the right path to the wrong destination. See point III, *infra*.

Illinois Supreme Court Justice Schaefer has succinctly stated the central reason why courts have, in general, been reluctant to extend to statutory torts the contribution rule enunciated in *Cooper Stevedoring*. "The reason, I think, is that the problem is not self-contained. It cannot be satisfactorily solved by judicial announcement of a rule requiring contribution among joint tortfeasors." Schaefer, *Precedent and Policy*, 34 U. Chi. L. Rev. 3, 13 (1966). Instead, a decision in favor of contribution would give birth to a host of difficult questions, including: whether contribution may be asserted against parties (and non-parties) that elect to settle; if not, whether the liability of non-settling defendants is reduced by the amount of the settlement or, instead, by the amount the settlors would owe were contribution from them permitted; in either event, whether contribution shares should be equal, based on comparative fault, comparative benefit from the wrongdoing, or some other equitable measure; whether settling parties can be impleaded back into the litigation so that contribution shares may be determined; whether settling parties can themselves claim a right to contribution; whether contribution is available to "intentional" tortfeasors;[11] whether contribution claims may be tried to a jury; and, finally, what statute of limitations applies and when it begins to run. Therefore, even if, as petitioner repeatedly asserts (Pet. Br. 11, 12, 13), the right to contribution is properly classed as an equitable remedy,[12] the recognition

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[11] The majority of jurisdictions have continued the common law rule that there is no contribution in favor of those who commit intentional torts. *Restatement (Second) of Torts* § 886A(3), Comment j (1979); W. Prosser, *Handbook of the Law of Torts* § 50, at 308 (4th ed. 1971). Although the intentional/unintentional distinction is reasonably well understood in the context of traditional common law torts, how, if at all, it should be applied to statutory torts, and in particular to violations of employment discrimination laws, is far from apparent.

[12] Petitioner also equates the task of fashioning a rule of contribution to the development of evidentiary rules in federal criminal

of that remedy would involve the courts in the fashioning of a considerable body of substantive and procedural law (divorced from the underpinning of well-developed admiralty doctrine that informed the Court's decision in *Cooper Stevedoring*).

As the court of appeals recognized (Pet. App. 8d), inasmuch as a claim to contribution is a right of action by a "defendant turned third-party plaintiff" based on an asserted federal statutory violation, the tests developed by this Court for determining whether a private right of action to remedy violations of a particular statute should be implied from that statute's purposes and history [13] provide pertinent guidance in determining whether a right to contribution should be implied here. Accord, *Glus* v. *G. C. Murphy Co.*, *supra*, slip op. 12-13. In both cases, the matter is obviously one within the competence of Congress to decide. Therefore, in the absence of explicit congressional direction, the task of the courts is not to create law or fashion policy, but rather to ascertain Congress's purposes in passing the

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cases, an undertaking this Court identified in *Funk* v. *United States*, 290 U.S. 371 (1933), as a proper one for the judiciary. The analogy does not hold. When this Court formulates rules of evidence, it exercises its traditional supervisory authority over the administration of criminal justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332, 341 (1943). That task falls within its statutory power to make rules governing practice, pleading, and procedure. 18 U.S.C. 3771; *Hawkins* v. *United States*, 358 U.S. 74, 78 (1958). To fashion a right to contribution, in contrast, is to create a cause of action not explicitly authorized by Congress—thus redefining substantive, rather than procedural, rights.

[13] In *Cort* v. *Ash*, 422 U.S. 66, 78 (1975), four tests were set out: (1) whether the plaintiff is one of the class for whose especial benefit the statute was enacted; (2) whether there is any indication of a legislative intent to create or deny a private right of action; (3) whether implication of such a right is consistent with the underlying purposes of the legislative scheme; and (4) whether the cause of action is one traditionally relegated to state law, thus making it inappropriate to infer a federal cause of action.

particular statute, and to determine whether in furtherance of those purposes Congress, had it focused on the issue, would have provided for the right of action in question.

The court of appeals suggested (Pet. App. 8d) that application of *Cort* v. *Ash*, 422 U.S. 66 (1975), would apparently doom every contribution claim since defendants turned third-party plaintiffs will likely never be part of the class for whose especial benefit the statute was enacted. But this Court in *Cort* merely stated that the "several [enumerated] factors are relevant" (422 U.S. at 78), and did not indicate that any one of them is necessarily dispositive, regardless of how strongly the others may suggest an opposite conclusion under a particular statute. Of course, application of the first *Cort* standard would nonetheless be a substantial impediment to the finding of an implied right of contribution. But we see no reason why a violator of the statute should have an easier burden in this regard than must be borne by a wholly innocent claimant who has been injured by a statutory violation but who is found not to be one of the class for whose especial benefit the statute was enacted. And surely an injured claimant who is a member of that class should have a lesser burden than that of a violator in establishing an implied right of action in his favor.

While the approach courts have followed in determining whether an implied right of contribution should be recognized is very much like that followed in considering whether a first-party right of action should be implied, it inevitably is more complex in view of the subsidiary issues associated with contribution (see page 12, *supra*), and requires a greater degree of judicial involvement. To be sure, the bare recognition of a first-party private right of action does not end the matter; there remain such questions as what remedies may be invoked, by whom, and when. But the reference point for these questions is the statute itself, which sets out rules of conduct, standards of proof, procedures and remedies. In

the contribution context, however, resort inevitably must be made outside the statute to general notions of fairness and efficacy.

Balancing these considerations, we believe the approach this Court should follow in analyzing the contribution question is to apply the *Cort* v. *Ash* criteria, with somewhat greater rigor than might be appropriate in their more traditional context. We have followed that approach in determining what position to adopt with respect to contribution arising out of Equal Pay Act liability and in reassessing the position previously taken by the EEOC on Title VII.[14] Specifically, we have focused on whether and to what extent a contribution rule would further or detract from the policies underlying both statutes, and the impact such a rule would have on the agency's enforcement efforts. It is to these questions that we now turn.

II. AN IMPLIED RIGHT TO CONTRIBUTION WOULD UNDERMINE THE POLICIES, AND INTERFERE WITH ENFORCEMENT, OF THE EQUAL PAY ACT

A. Whether A Private Right Of Action Against Unions Exists Under The Equal Pay Act Is Subject To Doubt

Whether or not contribution would further the purposes of the Equal Pay Act, it is not available unless both the party seeking it and the party from whom it is sought could have been held liable for damages if sued by the discriminated against employee. See W. Prosser, *Handbook of the Law of Torts* § 50 (4th ed. 1971). Ordinarily, then, the proper course would be for this

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[14] In the court of appeals, the EEOC as an *amicus curiae* took the position that contribution is available under Title VII if the contribution claim is asserted at an early stage in the aggrieved employee's suit so that conciliation may be attempted. The Commission took no position on the Equal Pay Act question since it had not yet assumed enforcement responsibility for that statute. As a result of this Court's invitation to participate on writ of certiorari, the Commission has reconsidered its position and, by formal vote, concluded that an implied right of contribution should *not* be available under either Title VII or the Equal Pay Act.

Court to consider at the threshold whether the *Laffey* plaintiffs could have brought suit against the respondent unions.[15]

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[15] Indeed, the court of appeals' affirmance of the dismissal of this action, insofar as it is premised on Equal Pay Act liability, turned in large part on its conclusion that (Pet. App. 9d) "[i]t is improbable that an employee would ever have an implied cause of action under the [Act] against his union."

Petitioner, relying on a line of cases holding that the common liability predicate may be satisfied even if one wrongdoer's potential liability has a basis different from another's, contends (Br. 29-34) that an employer held liable under the Equal Pay Act may seek contribution from a union subject to suit under a different statute (or common law theory) without regard for whether the union is suable under the Pay Act. Since every Pay Act violation also constitutes a violation of Title VII (compare 29 U.S.C. 206(d) with 42 U.S.C. 2000e-2(h); *Schultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970); *Laffey* v. *Northwest Airlines, Inc., supra*, 567 F.2d at 445-446; *Ammons* v. *Zia Co.*, 448 F.2d 117, 119 (10th Cir. 1971)), a statute under which unions unquestionably may be sued by private parties (42 U.S.C. 2000e-5(f) and 2000e-5(g)), and since conduct violative of the Pay Act that is arbitrary or based on discriminatory or bad faith motives may also violate the union's duty of fair representation (*Vaca* v. *Sipes*, 386 U.S. 171, 190 (1967); *Amalgamated Ass'n of Street Employees* v. *Lockridge*, 403 U.S. 274, 299, 301 (1971); *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554, 570-571 (1976)), acceptance of petitioner's argument would obviate the need at this stage of the case to consider whether an implied private right of action against unions exists under the Pay Act. The question might have to be resolved in considering the appropriate measure of contribution, however, since only the Pay Act provides for liability for liquidated damages. In any event, while we agree for the reasons stated at page 20, *infra*, that the Court need not address the question, we find petitioner's reasoning unpersuasive.

Whatever the merits in a traditional tort context of the view that common liability need not arise out of a single statute or common law tort theory, application of that principle in this context is inappropriate. As we illustrate below (see pages 18-19, 20-21, *infra*), although their coverage overlaps, the remedies provided by and rationales underlying Title VII and the Equal Pay Act are quite distinct. While these differences do not, in and of themselves, render petitioner's argument invalid, it should be recognized that the two statutes are not in all respects functional equivalents. Sec-

As we observed in our response to the petition (Br. 7-11), that question is quite knotty. There is much to suggest that Congress intended that unions would be covered by the Equal Pay Act and held accountable under it in the same manner and to the same extent as employers. The provision prohibiting labor unions from "caus[ing] or attempt[ing] to cause" employers to violate the Equal Pay Act originated in an amendment to an equal pay bill, H.R. 11677, that passed both houses of Congress in 1962 but was not enacted prior to the close of the session. Representative Zelenko, who offered the amendment, noted (108 Cong. Rec. 14766-14767 (1962)) that organized labor favored it and was "willing to be placed in this bill and to be subject to its penalties * * *." Those penalties included back wages in a suit brought against a respondent "employer or labor organization" by the Secretary of Labor. H.R. 11677, 87th

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ondly, acceptance of petitioner's theory would provide a means of invoking Title VII while circumventing its policy in favor of conciliation and voluntary resolution of disputes. See pages 28-29, *infra*. Where the underlying claim against the party seeking contribution is premised on Title VII, an opportunity for conciliation is available, at least as between the plaintiff and the initial defendant. And were this Court to conclude, contrary to our view, that an implied right to contribution exists under Title VII, it would be appropriate to afford an opportunity for conciliation with the contribution defendant as well. However, where underlying liability is premised on the Equal Pay Act, conciliation is not statutorily required. Therefore, to permit the common liability predicate to be satisfied by virtue of a union's potential Title VII liability would be to invoke the name of that statute without incorporating its substance.

Moreover, if the Court agrees with our contention that notwithstanding union liability under Title VII contribution is not available under that statute (see pages 27-31, *infra*), it would be inappropriate to rely on union liability under Title VII as a predicate for contribution under the Pay Act. Finally, if, as we contend, unavailability of contribution under the Pay Act and Title VII is grounded in the policies of those statutes, employers should not be allowed to assert a breach of a more generalized duty of fair representation (of others) to circumvent those statutory policies.

Cong., 2d Sess. §§ 6(a), 6(d), 108 Cong. Rec. 14766 (1962). The bill did not, however, expressly contemplate a private right of action against either offender. Rep. Griffin expressed the view (108 Cong. Rec. 14752 (1962)) that labor unions "are * * * directly involved in creating the conditions or situations which are discriminatory." He therefore applauded the amendment because "labor unions are made accountable and responsible for their part, if any, in discriminating against women," and noted that the provision would make the bill "self-policing" (*ibid.*).

The bill that became the Equal Pay Act of 1963, introduced as H.R. 6060, differed from its predecessor in that it adopted the enforcement scheme of the Fair Labor Standards Act. Even so, the bill carried over the prohibition against unions' causing or attempting to cause employers to pay women less than men for equal work. As Representative O'Hara, a member of the subcommittee that drafted the final bill, stressed (109 Cong. Rec. 9209 (1963)), "if a labor organization is in any way at fault in maintaining such a discriminatory wage rate, [it] would be subject to all the penalties and all the enforcement provisions provided under the Fair Labor Standards Act."

Based on this history, it can be argued that Congress intended that unions and employers would be treated alike and would be subject to the same liabilities. On the other hand, the FLSA enforcement provisions to which Representative O'Hara alluded, insofar as they provide for repayment of illegally withheld wages, are directed solely at employers. Moreover, the very structure of the Fair Labor Standards Act, and its underlying rationale, are inconsistent with monetary recovery from unions. In essence, an employer who violates the equal pay provisions of the FLSA has, like the employer who fails to pay the statutory minimum wage, obtained services without paying full value for them. The employer thus derives a competitive advantage over companies that pay women fair value for their services. The measure of

damages under the FLSA is the difference between what an employer should have paid its disfavored employees and what it in fact did pay. In other words, the employer is reduced to competitive parity and forced to disgorge unfair profits. Furthermore, employers may be assessed an equivalent amount as liquidated damages to compensate injured employees for the delay in payment of wages. This "double damages" remedy places employer wrongdoers at a competitive *dis*advantage and thus provides an economic incentive to comply with the statute. See generally pages 20-22, *infra*.

It is difficult to see how unions fit into this scheme. Although a union certainly may "cause" an employer to adopt salary or wage differentials that violate the Equal Pay Act, it ordinarily would not benefit financially thereby. Thus, while in such circumstances the union would itself have violated the Pay Act, monetary recovery against it ordinarily would be inconsistent with the rationale of the statute as incorporated into the FLSA. The union's treasury thus would be a particularly inappropriate source from which to recover withheld wages. It is a "common fund" comprised of dues paid by the very women whose wages have been artificially depressed; by their male counterparts who presumably have been paid fair market value, but no more, for their services; and by other union members who are not in the affected job categories and may not even work for the offending employer.

Nothing in the legislative history of the Equal Pay Act reflects any awareness on the part of Congress of the tension between the expressed desire to hold unions accountable and the Act's adoption of the enforcement scheme embodied in the Fair Labor Standards Act. Nevertheless, Congress may fairly be charged with knowledge of the nature of the remedy it adopted since in merging the Equal Pay Act into the FLSA, it sought, *inter alia*, to take advantage of established procedures and standards with which industry and labor were long familiar. See 109 Cong. Rec. 9195 (1963) (remarks of Rep. Fre-

linghuysen); 109 Cong. Rec. at 9196 (remarks of Rep. Thompson); *id.* at 9207 (remarks of Rep. Carey); *id.* at 9210 (majority views introduced by Rep. Goodell); *id.* at 9216 (remarks of Rep. O'Hara). It therefore seems to us that whether a private right of action exists against unions under the statute is subject to considerable doubt.

The Court need not, however, decide that issue in this case because, in our view, there are other persuasive reasons, detailed below, for concluding that an employer who violates the Equal Pay Act should not be permitted to seek contribution from a union. Given the relative difficulty of the threshold issue and the fact that the Commission has not yet been called upon to resolve the question in a case directly presenting it, the Court may wish to reserve judgment on it.

B. Like Other Provisions Of The FLSA, The Equal Pay Act Is Designed To Prevent Employers From Engaging In Unfair Competition Through The Payment Of Substandard Wages

The Equal Pay Act, while directed to a category of employment discrimination, is an integral part of the Fair Labor Standards Act. In merging the two statutes, Congress folded the substantive provisions of the Pay Act into the preexisting statute (with Section 3 of the Equal Pay Act becoming 29 U.S.C. 206(d)), and provided (29 U.S.C. 206(d)(3)) that salary and wage differentials made unlawful by the Pay Act "shall be deemed to be unpaid minimum wages or unpaid overtime compensation under [the FLSA]."

The enforcement scheme of the FLSA is designed to deprive employers of the economic benefits they derive from paying wages below the statutory minimum, from paying women less than men for equal work, and from requiring employees to work overtime at less than the statutory rate of compensation. The FLSA also is designed to protect the competitive positions of those em-

ployers who do comply with the statute.[16] 29 U.S.C. 202 (a)(3), 216(b) and 216(c); Section 2(a)(5) of the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56; *Wirtz* v. *Malthor, Inc.*, 391 F.2d 1, 3 (9th Cir. 1968); *Hodgson* v. *Wheaton Glass Co.*, 446 F.2d 527, 535 (3d Cir. 1971); *Wirtz* v. *Jones*, 340 F.2d 901, 904-905 (5th Cir. 1965). So fundamental are these goals that employers are obligated to disgorge wrongfully withheld wages even if injured employees cannot be located, unclaimed sums being paid over to the United States Treasury. 29 U.S.C. 216(c). See *Wirtz* v. *Jones*, *supra*, 340 F.2d at 904; *Hodgson* v. *Wheaton Glass Co.*, *supra*, 446 F.2d at 535; *Burk Builders, Inc.* v. *Wirtz*, 355 F.2d 451, 453 (5th Cir. 1966).

As both the district court and the court of appeals observed (Pet. App. 6b, 10d), these statutory objectives would be disserved were employers free to offset their Equal Pay Act liability through contribution. Offending employers would retain at least part of the fruits of their illegality in that they would have obtained services without paying full value for them; law-abiding competitors would be placed at a competitive disadvantage vis-a-vis employers able to shift part of their liability onto unions; and unions that gained no economic benefit from violating

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[16] Indeed, the stated purpose of the Act is to correct an "unfair method of competition." Section 2(a)(5), 77 Stat. 56. Federal, rather than merely state or local, regulation was needed in order to prevent interstate commerce from being "made the instrument of competition in the distribution of goods produced under substandard labor conditions." *United States* v. *Darby*, 312 U.S. 100, 115 (1941). By requiring the wages of women to be brought up to the level of those of male employees doing equal work rather than allowing the wages of the latter to be reduced (29 U.S.C. 206(d)(1)), the Equal Pay Act is premised on the sensible economic assumption that male employees are not being paid more than the fair market value for their services, and that lesser wages paid to women for equal work are therefore substandard wages.

the Equal Pay Act [17] would be called upon to disgorge non-existent profits.[18]

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[17] Petitioner contends (Br. 36) that where a union is male-dominated, a discriminatory division of a total wage package might well benefit the union's control group without conferring any economic advantage on the employer. That contention assumes, contrary to the Act's premise (see note 16, *supra*), that the employer would agree to pay those employees wages that exceed the fair market value of their services. Moreover, the hypothetical lack of a cumulative economic advantage for the employer would not absolve it from the legal responsibility for adopting a discriminatory wage policy in violation of the Act or make it less culpable than non-controlling members of the union to whose common fund the employer seeks to transfer liability. Furthermore, petitioner's hypothetical is far from paradigmatic of the problems the Pay Act was intended to address, and suggests instead the class of abuses for which the duty of fair representation was developed. Although in such circumstances a suit in equity by the EEOC might be appropriate (see note 18, *infra*), the hypothetical posed is hardly justification for making unions subject to contribution from employers.

Petitioner's suggestion that unions ultimately benefit from artificially lowered wages—the theory being that the resultant increased demand for the employer's cheaper goods and services increases employment levels and thus union dues—bears no relationship to reality. Otherwise, it would be in a union's interest to bargain for reduced wages, so long as care was taken that its members were paid enough to cover their union dues. Obviously, incumbent union members are more interested in increasing their own paychecks than in accepting salary cuts in hope that a series of fortuities will result in an expansion of the union's treasury.

[18] Petitioner erroneously contends (Br. 27 n.17) that our reading of the statute is inconsistent with the position taken by the government in *Hodgson* v. *Sagner, Inc.*, 326 F. Supp. 371 (D. Md. 1971), aff'd per curiam on opinion below, 462 F.2d 180 (4th Cir. 1972), and *EEOC* v. *Air Line Pilots Ass'n*, 489 F. Supp. 1003 (D. Minn. 1980).

In *Sagner*, the Secretary of Labor successfully argued in a suit brough under the Equal Pay Act, 29 U.S.C. 217, that as a matter of equity the union should be required to share responsibility for back pay. After the employer had agreed to make whole female employees against whom it had discriminated, the union insisted on diverting 75% of the amount unlawfully withheld to other em-

C. A Right To Contribution Would Nullify The Economic Incentive Built Into The Equal Pay Act's Remedies To Encourage Employer Compliance

Petitioner contends (Br. 34-39) that contribution would create an incentive for employers and unions alike to refrain from gender-based wage discrimination in that in every meritorious case they would face the "reasonably certain prospect" of backpay liability no matter who the plaintiff elected to sue. We agree with the dissenting judge in *Glus* v. *G. C. Murphy Co.*, *supra*, slip op. 39, that "[i]f it w[ere] clear * * * that a right of contribution would strengthen the deterrent impact of Title VII" and the Equal Pay Act, "then there might be a judicial responsibility to make those rules which are needed to effectuate the significant national policy represented by the statute[s]." However, the matter is hardly free from doubt. A rule opposing contribution might very well maximize deterrence in that potential violators

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ployees who had not been discriminated against. In such circumstances, equitable relief was entirely appropriate; the employer had disgorged the funds unlawfully withheld and was no longer at a competitive advantage, and the fund was misallocated at the union's insistence.

In *EEOC* v. *Air Line Pilots Ass'n*, the Commission brought suit under the Age Discrimination in Employment Act, 29 U.S.C. 621 *et seq.*, because the union insisted upon a benefits package that discriminated against its older members. The court held the union partially liable for back pay. Although the ADEA is similar to the Equal Pay Act in that it borrows remedies from the FLSA and treats discriminatorily withheld wages as unpaid minimum wages or overtime compensation, it is substantially different in material respects. In contrast to the Pay Act, the prevention of unfair competition was not one of Congress's purposes in passing the ADEA. See Section 2 of the Act, 29 U.S.C. 621. Moreover, the ADEA expressly authorizes courts to grant all "legal or equitable relief as may be appropriate to effectuate the purposes of [the Act]." Section 7(b) of the Act, 29 U.S.C. 626(b). See also Section 7(c) of the Act, 29 U.S.C. 626(c). The court in *EEOC* v. *Air Line Pilots Ass'n* bottomed its decision on this express grant of equity authority. The Equal Pay Act does not contain a parallel or similar provision.

might be more likely to refrain from illegal conduct knowing that they risk the full burden of a damages award rather than knowing they could spread the loss. See *Brennan* v. *Emerald Renovators, Inc.*, 410 F. Supp. 1057, 1061 (S.D.N.Y. 1975) ("no contribution" rule provides greater incentive for employers to comply with Equal Pay Act); *EEOC* v. *Ferris State College*, 23 Fair. Empl. Prac. Cas. 434, 441 (W.D. Mich. 1980) (same).

A similar debate regarding the effect of contribution on antitrust deterrence is now being waged among federal judges,[19] members of Congress,[20] participants in con-

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[19] See *Wilson P. Abraham Construction Corp.* v. *Texas Industries, Inc.*, 604 F.2d 897 (5th Cir. 1979), petition for cert. granted *sub nom. Texas Industries, Inc.* v. *Radcliff Materials, Inc.*, No. 79-1144 (Nov. 3, 1980) (panel majority concluding that contribution would undercut deterrence, and Judge Morgan, concurring in part and dissenting in part, asserting that the effect of contribution on deterrence is, at best, inconclusive); *Professional Beauty Supply, Inc.* v. *National Beauty Supply Inc.*, 594 F.2d 1179 (8th Cir. 1979) (panel majority maintaining that on balance contribution buttresses deterrence, and Judge Hanson, dissenting in part, concluding that the arguments on both sides of the deterrence question are inconclusive); *Olson Farms, Inc.* v. *Safeway Stores, Inc.*, 1979-2 Trade Cas. (CCH) ¶ 62,995 (10th Cir. 1979) (panel majority indicating that the effect of contribution on deterrence is indeterminative or speculative, and Judge Holloway, concurring in part and dissenting in part, adopting the panel majority view in *Professional Beauty Supply* that contribution would bolster deterrence); *Sabre Shipping Corp.* v. *American President Lines, Ltd.*, 298 F. Supp. 1339, 1346 (S.D.N.Y. 1969) (declaring that contribution would thwart the statutory purpose of treble damage actions); *El Camino Glass Co.* v. *Sunglo Glass Co.*, 1977-1 Trade Cas. (CCH) ¶ 61-533 (N.D. Cal. 1976) (concluding that a "no contribution" rule safeguards antitrust deterrence).

[20] Compare views of the Senate Judiciary Committee majority on a pending bill, S.1468, S. Rep. No. 96-428, 96th Cong., 1st Sess. 17-19 (1979) (hereinafter "Senate Report") (concluding that contribution in price-fixing cases can strengthen deterrence), with supplemental views of Senators Kennedy and Metzenbaum, at 29, 32 (insisting that the proposed contribution remedy and its corollary of mandatory claims reduction may undercut deterrence).

gressional hearings,[21] and commentators.[22]

Given the lack of consensus on this issue, the assertion that contribution would deter Title VII and Equal Pay Act violations is wholly speculative and cannot justify judicial creation of the right. Cf. *Ferri* v. *Ackerman*, 444 U.S. 193 (1979) (while absence of immunity in state malpractice suit for attorneys appointed pursuant to Criminal Justice Act may dissuade members of private bar from accepting representation, the argument raises questions more appropriately answered by legislative body acting on the basis of empirical data).

Whatever the merits in other contexts of the debate over whether potential wrongdoers would more likely be deterred by the reasonable certainty that they will not get off "scot free" than by the risk of liability for

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[21] See *Hearings on S.1468 Before the Subcomm. on Antitrust, Monopoly and Business Rights of the Senate Comm. on the Judiciary*, 96th Cong., 1st Sess. (1979) (hereinafter "Senate Hearings"): statement of John Shenefield, Assistant Attorney General, Antitrust Div., Dept. of Justice (expressing the view that contribution may weaken the deterrent to intentional violators); testimony and statement of Lowell E. Sachnoff; testimony and statement of Harold E. Kohn; statement of Donald J. Polden; and letter to Senate Judiciary Committee from Mark Green, director, Congress Watch, all asserting that contribution will undermine deterrent against intentional antitrust violations. Compare statement and testimony of Robert P. Taylor, director, ABA task force on contribution; statement of Donald G. Kempf; testimony of Donald Hibner (arguing that contribution may aid deterrence and that a "no contribution" rule is ineffectual because businessmen are ignorant of the rule and hence do not consider it in their actions).

[22] See Note, *Contribution in Private Antitrust Actions*, 93 Harv. L. Rev. 1540, 1544-1548 (1980) (concluding that contribution would not materially reduce deterrence); Easterbrook, Landes, and Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, presently scheduled for publication in the October 1980 issue of the Journal of Law and Economics (concluding that contribution would not increase deterrence); Rose, *Contribution In Antitrust: Some Policy Considerations*, presently scheduled for publication in the Antitrust Law Journal (1980) (concluding that the effects of contribution on deterrence are indeterminate).

maximum (and disproportionate) damages, the Equal Pay Act's built-in disincentive to employer misconduct would be seriously undermined were contribution available. In addition to permitting employees to recover the difference between what they actually earned and what they would have earned absent the violation, the FLSA provides (29 U.S.C. 216(b)) that an employer who violates the substantive provisions of the statute, including those requiring equal pay for equal work, "shall be liable * * * in an additional equal amount as liquidated damages." Designed primarily to compensate employees for consequential damages (*Brooklyn Savings Bank* v. *O'Neil*, 324 U.S. 697, 707-708 (1945); *Overnight Motor Transp. Co.* v. *Missel*, 316 U.S. 572, 583-584 (1942)), liquidated damages serves as a true deterrent to unlawful conduct by compelling an employer to disgorge an amount greater than the wages it unlawfully withheld. Absent this liability for "double damages," an employer would risk nothing by violating the statute. For so long as it escaped detection and enforcement, it would enjoy a competitive advantage over nonviolators. Once sued, it need only do what the statute commanded it to do in the first place—eliminate the pay differential and restore sums unlawfully withheld. Attempted violation would thus risk nothing more than a restoration to competitive parity. In contrast, liability for double damages operates to the violator's competitive disadvantage, and thus constitutes the "spur or catalyst" encouraging compliance. Cf. *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-418 (1975). By permitting an employer to shift part of that cost to a union, contribution would dissipate or destroy the Act's deterrent effect.

We submit, therefore, that a right to contribution should be rejected under the Equal Pay Act in order to preserve the Act's economic disincentive for employer misconduct. In taking this position, we are not unmindful of the need to hold unions to their statutory obligation to refrain from causing or attempting to cause employers to violate the Act. Should it ultimately be decided that

unions are subject to Pay Act damages suits by their members (see pages 15-20, *supra*), they will face the same exposure as employers. No matter how that question is resolved, unions are subject to employee damages suits (but not liquidated damages) under Title VII and, where appropriate, the duty of fair representation; to EEOC suits seeking injunctive relief (29 U.S.C. 217); and in flagrant cases to a Commission suit for damages (*Hodgson* v. *Sagner, Inc., supra*).

III. A RIGHT TO CONTRIBUTION WOULD UNDERMINE THE POLICIES, AND INTERFERE WITH ENFORCEMENT, OF TITLE VII

A. A Right To Contribution Would Nullify Commission Efforts To Encourage Compliance With Title VII Through The Exercise Of Prosecutorial Discretion

After a two-year study of ways to encourage voluntary compliance with Title VII, the EEOC recently adopted a policy designed to encourage good faith efforts "of a compelling and aggressive nature" by employers or unions to eliminate discriminatory employment practices when their bargaining partners oppose voluntary compliance. As one incentive, the Commission resolved that in appropriate cases a party's good faith or unilateral efforts should shield it from government prosecution. See Title VII and Collective Bargaining: Proposal and Resolution To Encourage Voluntary Efforts, Daily Lab. Rep. (BNA) D-1 (Apr. 2, 1980) (App., *infra*).

Where the Commission for these reasons elects to sue only one signatory to a discriminatory collective bargaining agreement, if that defendant were permitted to litigate a contribution claim against its bargaining partner the government's prosecutorial discretion would be nullified and the policy described above undermined. While such third-party defendants might in many cases succeed in resisting contribution claims, in some circuits good faith efforts to eliminate discriminatory practices

might not be a sufficient defense.[23] In any event, the risk of third-party liability and of the costs and efforts associated with resisting such liability would discourage employers and unions from the very efforts to expose and oppose discrimination that the Commission is seeking to encourage.[24]

B. A Right To Contribution Is Not Compatible With Title VII's Twin Objectives Of A Preference For Conciliation And An Opportunity For Effective Enforcement

1. The charge-filing requirements of Title VII and the statute's entire administrative scheme [25] reflect Congress's judgment that parties subject to liability should have an opportunity to resolve the matter in controversy prior to litigation. Accordingly it often has been recognized that in enacting Title VII Congress "selected '[c]ooperation and voluntary compliance * * * as the preferred means for achieving' the goal of equality of employment opportunities." *Occidental Life Insurance*

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[23] For example, the courts of appeals have split regarding the grounds for holding unions monetarily liable for discriminatory provisions in collective bargaining agreements. Language in several cases suggests that a union can avoid Title VII back pay liability by negotiating actively for a nondiscriminatory contract. See, *e.g.*, *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 989 (D.C. Cir. 1973); *Johnson* v. *Goodyear Tire and Rubber Co., Synthetic Rubber Plant*, 491 F.2d 1364, 1381-1382 (5th Cir. 1974). However, in other cases in which unions attempted without success to negotiate nondiscriminatory contracts, the courts have held them strictly responsible for the results of their negotiations. See, *e.g.*, *Myers* v. *Gilman Paper Corp.*, 544 F.2d 837, 848-849 (5th Cir.), modified on rehearing, 556 F.2d 758, cert. dismissed, 434 U.S. 801 (1977); *Patterson* v. *American Tobacco Co.*, 535 F.2d 257, 270-271 (4th Cir.), cert. denied, 429 U.S. 920 (1976). See generally Note, *Union Liability for Employer Discrimination*, 93 Harv. L. Rev. 702 (1980).

[24] Of course the EEOC cannot, and should not, immunize employers or unions from Title VII suits brought by private parties. Such private suits, however, are not commonly brought in duplication or supplementation of active Commission enforcement efforts.

[25] See 42 U.S.C. 2000e-4(g)(4); 2000e-5(b), 2000e-5(f)(1), and 2000e-5(f)(2).

Co. v. *EEOC*, 432 U.S. 355, 379 (1977), quoting *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). To the extent that contribution claims could be asserted against parties neither named in a charge nor otherwise afforded an opportunity to conciliate,[26] a right to contribution would defeat this congressional policy.

Contribution, moreover, may deter settlement even when all parties are afforded an opportunity to conciliate. The incentive to settle undoubtedly is lessened if a settling defendant (or potential defendant) faces a future claim for contribution by a defendant subsequently held liable to a charging party. See generally *Restatement (Second) of Torts* § 886A, Comment (1979); W. Prosser, *Handbook of the Law of Torts* § 50, at 309-310 (4th ed. 1971); Note, *Contribution Among Antitrust Violators*, 29 Cath. L. Rev. 669, 672-675 (1980). If settling defendants are *not* subject to contribution and the liability of non-settlors is reduced only by the amount of the settlement, collusion among the settling parties would be encouraged. Moreover, such a rule would defeat the primary purpose of contribution—the equitable distribution of damages among jointly responsible tortfeasors—since even in the absence of collusion parties almost always settle for less than their proportionate share of the liability. If, on the other hand, the liability of non-settlors is reduced by an amount equal to the settlors'

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[26] The EEOC involves a union in conciliation as a matter of course when it appears from the face of a charge that a collective bargaining agreement is involved. *EEOC Compliance Manual* (CCH) § 62.7(c) (1979). However, where the practice alleged to be discriminatory is not memorialized in an agreement, a union might not be impleaded as a contribution defendant until the middle of the litigation or, as here, might be sued in a separate action. In such circumstances, it would have had no opportunity to conciliate.

Unions and employers are not the only possible contribution defendants. Agents, corporate subsidiaries and parents, and employment agencies may also be liable under Title VII (42 U.S.C. 2000e-5(a), (c)) and, hence, fair game for contribution. They rarely will have had the opportunity to conciliate.

equitable share of the joint obligation, the injured party's total recovery would depend on how much of the blame for the violation is attributed to the settling defendants who would not be present at trial to assure an accurate account. The non-settlors would, of course, have every incentive to shift the blame to their settling co-tortfeasors, to the ultimate disadvantage of the plaintiffs. In these circumstances, the plaintiffs might well conclude that the best course is to proceed to trial against all defendants: a trial cannot be avoided so long as some defendants refuse to settle; a trial against the holdouts would be nearly as complex as one against all defendants in view of the need to determine equitable shares of liability; only by taking on all parties could the plaintiffs assure themselves full recovery.

2. Finally, contribution would complicate Title VII actions to the detriment of private plaintiffs. Title VII plaintiffs typically are persons of relatively limited means, assisted, if at all, by counsel who are court-appointed or privately retained on a contingency fee basis. A contribution rule would, as a practical matter, force them to combat not only one defendant, but all third-party contribution defendants who have been impleaded or have intervened in the action.[27] Each of these defendants likely would have financial resources far superior to the plaintiff's, and each would have an interest in defeating the plaintiff's claim as well as the contribution claim.

As a consequence of the expanded scope of the litigation, the amount of discovery (both offensive and defensive) would increase, trial preparation would become more extensive and difficult, new defensive issues would

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[27] Even if not impleaded, potential contribution defendants might well elect to intervene in the Title VII proceeding rather than await a separate contribution action like the instant one, reasoning that their chances of defeating the plaintiff would surpass their chances of defeating the Title VII defendant turned contribution-plaintiff because of the latter's greater litigating resources and its superior access to evidence.

arise (see page 12, *supra*), and trial time would lengthen.[28]

These problems of course would not exist where contribution is sought in a separate proceeding. However, such proceedings would make poor use of scarce judicial resources by greatly proliferating Title VII suits without a corresponding increase in statutory enforcement. Furthermore, they would virtually foreclose any opportunity for conciliation between the contribution defendants and the Title VII plaintiffs whose suit for damages exposed them to liability.

For all these reasons, we submit that a right to contribution would not be compatible with the statutory policies of Title VII.

CONCLUSION

The judgment of the court of appeals, insofar as it pertains to the Equal Pay Act, should be affirmed. In all other respects, the judgment should be vacated and the case remanded with instructions to dismiss.

Respectfully submitted.

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[28] In addition to having these disadvantages, the course advocated by the Commission in the court below—that contribution claims be allowed only if asserted early enough to allow the plaintiff's suit to be held in abeyance while there is an opportunity for Commission conciliation with the third-party defendant—would unfairly delay the plaintiff's suit and deflect limited Commission resources into conciliation efforts not requested by either party to the conciliation. On reflection, we believe that course would impede the effective enforcement of Title VII and accordingly would be incompatible with its statutory policies.

APPENDIX

TITLE VII AND COLLECTIVE BARGAINING: PROPOSAL AND RESOLUTION TO ENCOURAGE VOLUNTARY EFFORTS

Pursuant to a Commission approved resolution adopted May 30, 1978, a special task force was formed to examine policy proposals that, if approved by the Commission, would promote Title VII objectives within the context of collective bargaining. The goal would be to spur unions and employers to undertake initiatives voluntarily towards eliminating discriminatory employment practices, including unilateral efforts by one party where the other party is uncooperative.

In part, the resolution was a response to the frustration of both unions and employers who seek to engage in good faith efforts in behalf of Title VII. Frequently they perceive themselves as exposed to liability for the discriminatory acts of the other but, because of their symbiotic relationship, are also hamstrung as regards effective independent action. They are reluctant not only to act, but, aware of no Commission policy to recognize such efforts, even to respond to activity not entirely within their control. As a consequence, this project was launched to pursue discussions with employer and union groups that raised issues and problems bearing on the overall objective. Such meetings have progressed over a stretched out time frame. They were generally fruitful in clarifying and identifying issues and tasks necessary to be addressed for purposes of the Commission's mandate.

In the interim and with rather fortuitous timing, the Supreme Court delivered its opinion in *United Steelworkers of America, AFL-CIO* v. *Weber, et al.*, —— U.S. ——, 99 S. Ct. 272 (1979), where the Court endorsed resort to the collective bargaining forum between a union and employer as an appropriate and effective means for developing and implementing voluntary affirmative action plans.

During this time also, the National Labor Relations Board decided *Westinghouse Electric Corp.*, 239 NLRB No. 19 (1978) and *East Dayton Tool and Dye Company*, 239 NLRB No. 20, 1978), holding that unions are entitled to receive EEO data from the employer. This line of case law gives the "green light" to both unions and employers to engage actively in voluntary affirmative action by providing the legal support and insulation for such specific endeavors.

Weber is especially pertinent. It was enough for the Court that Kaiser and the union, by reasonable action, had endeavored to break down old patterns of racial segregation. This means that employers and unions are free to urge a response to Title VII and use their own facilities to meet their own particular needs without concerning themselves with the issue that such endeavors will be tacitly construed as an admission of past discrimination or whatever. A good deal of industry is unionized. Management and union partnerships ought to be stimulated to dedicate themselves to prospective changes in the work force. What motivated Kaiser and the Steelworkers is repeated throughout American industry. However, if only one of the partners is a willing advocate to such undertakings, it becomes imperative for government to find a means of assisting unions and management despite the resistance they may encounter from their collective bargaining partner.

As the cases are beginning to lend weight and credence to voluntary endeavors, the Commission should do whatever it can to make it within the self interest of unions and management to take voluntary action. Indeed pursuing such a policy would be in keeping with the Commission's recent strategy initiatives that encourage voluntary efforts. Such strategies include the "Bottom Line" policy as part of the Uniform Selection Guidelines, targeting offenders for systemic enforcement efforts on a "worst-first" priority basis and seeking to insulate employers who engage in affirmative action with EEOC's

Guidelines on Voluntary Affirmative Action. Accordingly, the following recommendations are urged to begin the process.

I. *Fundamental Policy*

The basic policy underlying the strategy must be that the Commission, its processes and procedures, will recognize the "good faith" efforts of unions and/or employers towards eliminating discrimination, *particularly* where either party has to act alone and without the cooperation of the other. Fundamentally, this would simply be another manifestation of the Commission's prosecutorial discretion. Pursuant to such a policy, the Commission would seek to cooperate with a union (in appropriate circumstances) filing charges against an employer. Similarly, the Commission would support an employer's voluntary compliance efforts.

The level and kinds of activity necessary to establish "good faith" efforts will have to be evaluated on a case-by-case basis. Mere token gestures are insufficient. The Commission will be looking for concerted, aggressive action of a compelling nature. The Commission will have to be flexible in its approach to this question since the exigencies of the bargaining process do not allow for simple resolutions to what is a very complex problem. However, this difficulty should not prevent the Commission from taking what is essentially the only rational approach.

The appropriateness of recognizing a party's good faith efforts has most recently been endorsed by the Ninth Circuit Court of Appeals in *Social Services Union, Local 535* v. *County of Santa Clara*, 21 FEP 684 (1979). The court held that because of the union's initiatives prior to filing suit it could be the class representatives of its members in Title VII litigation despite the fact that it was a signatory to the collective bargaining agreement containing the challenged discriminatory provisions. In so holding, the court stated that it was reasonable for

the unions to believe that "their vigorous efforts to correct discrimination . . . would protect them from liability for backpay if the suit succeeded."

See also *Burwell* v. *Eastern Airlines*, —— F.Supp. ——, 17 FEP 1687 (D. Va. 1978) where the court found union liability for being signatory to a collective bargaining agreement with discriminatory provisions and for failing to take adequate steps to challenge those provisions. However, because the court found that Eastern unilaterally imposed the unlawful provisions to which the union acquiesed under protest, and because of other union good faith efforts, the court did not award backpay against the union.

II. *Impact of Policy on Commission Program*

Programmatically, the policy would manifest itself at two primary administrative junctures: a) during charge processing, and b) during litigation. There is already Commission precedent for both, but such recognition occurs only on an *ad hoc* basis. As a consequence, the Commission is perceived as having an insufficient understanding of the dynamics involved. Only with a clearly articulated strategy designed to implement a specific policy can the Commission expect to exert any influence.

A. *Charge Processing*: It became apparent through discussions and correspondence with unions and employers that Commission staff operations need to have more specific instruction regarding the status of parties within the context of Title VII. Some field staff have failed to appreciate that there are gradations among parties in the context of assigning culpability. Unions, for example, can file as charging parties under the statute. But, there have been times when staff have "requested" that unions withdraw as charging parties or have refused to accept their charges. There is, therefore, considerable frustration with the apparent inability of the Commission to respond in a *positive* manner to union efforts to file charges. One union actually was com-

pelled to bring a civil suit against the Commission last year to insure acceptance of charges filed by itself as an aggrieved person. At times, some of these problems have been administratively addressed through field directives and, indeed, an investigative manual is currently being developed that will contain a chapter on unions.

It is urged that the Commission issue such instructions through the upcoming manual, through "Field Notes," the Compliance Manual, and any other appropriate instrument to establish a cumulative policy that will take advantage, *where feasible*, of union (or employer) efforts and resources in pursuing Title VII claims. It should be noted that this is, in fact, the policy as stated in "Field Notes" 904-15, but it is not stated clearly or effectively. As a consequence, field staff often appear uninformed or disinterested in helping unions effectively challenge discriminatory practices. This is not intended as a criticism of field staff. They have had a complex and difficult task absorbing the new procedures and harmonizing the different area jurisdictions now handled by them. The point is simply that better guidance to the field is definitely needed so they become familiar with and understand strategy and policy at the charge processing level. Standards should be developed by which the field, starting from intake and throughout charge processing, can better recognize the appropriate role for a union, whether as charging party or respondent in the Commission process.

Additionally, it will be necessary to develop more comprehensive investigative records to allow for more critical analysis at the litigation review stage.

It is *not* here being suggested that the agency revert to old habits of letting others (indirect parties) determine the Commission class action case load or otherwise direct its resources. Rather, it is being urged that unions and employers not be ignored in any efforts that stimulate voluntary compliance or efforts that serve to gather

and contribute considerable evidence on Title VII practices. The Commission should support such efforts, not thwart them.

Institutionally, the offices of Field Services, Policy Implementation, and General Counsel are involved, since they share the responsibility for developing and issuing the written guidance to the field. Jointly, they should be directed to modify and adjust their functions and missions so as to *affirmatively* reflect this policy.

B. *Litigation Review Process*: As a means of further encouraging unions and employers to initiate voluntary affirmative action, the Commission should, in recognition of a party's "good faith" or unilateral efforts to eliminate discriminatory practices, exercise its prosecutorial discretion where appropriate. As stated before, the measure of "good faith" that triggers such prosecutorial inhibition will necessarily have to be determined on a *case-by-case* basis since union-employer relationships are so varied. A "good faith" standard, however amorphous, might be developed with reference to the NLRB's similar policy on employers charged with unfair labor practices because of unilateral action taken by them in the face of union recalcitrance.

Recently, a recommendation for intervention presented a case susceptible to such treatment. An employer sought to unilaterally make a seniority rule change in an effort to come into compliance with the Age Discrimination Act that was resisted by the bargaining union. There are also examples of successful voluntary employer and/or union activity as manifested by programs initiated by the IUE and the Woodworkers Unions. Programs of this type might be encouraged by a Commission policy that rewards such endeavors.

Accordingly, it is recommended that in seeking litigation approval to institute actions against parties to collective bargaining agreements, the Office of General Counsel address separately and distinctly the question of voluntary affirmative action on the part of unions and/or em-

ployers, including the issue of "good faith" efforts, degree of culpability and so forth. Similarly, the failure to take such actions should be noted as well as an aid to the Commission in its litigation determinations.

Conclusion

In keeping with the Commission's own strategies for emphasizing and promoting voluntary acts as a preferred means of advancing equal employment opportunities, it would be appropriate to focus on the collective bargaining process as a unique forum arising at the threshold of the employment relationship. Commission strategy must provide encouragement as well to voluntary acts in those instances where efforts to achieve joint union-employee cooperation might otherwise appear futile.

The attached resolution is offered as the vehicle for framing Commission policy on this matter and as the authority for the steps needed to implement such policy.

* * * *

COMMISSION RESOLUTION TO ENCOURAGE VOLUNTARY AFFIRMATIVE ACTION

Whereas, the Equal Employment Opportunity Commission has a responsibility to encourage voluntary endeavors to eliminate discriminatory employment practices,

Be it resolved that, in order to encourage such voluntary endeavors by unions and employers, the Commission hereby consolidates and adopts the following policy:

1. Through its administrative processes, the Commission shall recognize the "good faith" efforts of unions and employers to eliminate discriminatory employment practices, whether undertaken in cooperation with each other or unilaterally; "good faith" must be of a compelling and aggressive nature evaluated on a case by case basis;

2. When engaged in investigation, conciliation, and enforcement, the Commission shall exercise its discretion

in recognition of union or employer voluntary affirmative action that meets appropriate standards;

3. In order to implement this policy, the Offices of Field Services, Policy Implementation and the General Counsel shall develop, amend, and modify written instruction to the field staff that clearly reflects this policy with the understanding that criteria necessary to establish the standard of "good faith" as expressed above, shall be approved only by the Commission and,

4. The Office of the General Counsel, when engaged in enforcement activity and in exercising the Commission's discretionary enforcement authority, shall consider and evaluate voluntary affirmative action endeavors of potential union and/or employer respondents in accordance with paragraph 3 above.

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